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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-122

VASSER BISHOP, as Executrix of the Estate of David H. Bishop, Deceased,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. _____

VASSER BISHOP, as Executrix of the Estate of David H. Bishop, Deceased, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Vasser Bishop, petitioner, prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on March 7, 1972, petition for rehearing denied on April 26, 1972.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Mississippi (R. 316) is reported at 26 AFTR 2d 70-5970. A copy of the opinion is appended to this petition as Appendix "A."

Final judgment was entered by the District Court on May 27, 1971. (R. 421) (Appendix "B")

On March 7, 1972, the Court of Appeals for the Fifth Circuit affirmed per curiam the judgment of the District court. (Appendix "C")

Judgment was also entered by the Circuit Court of Appeals on March 7, 1972. (Appendix "D")

In an order filed March 13, 1972, the Circuit Court of Appeals for the Fifth Circuit denied petitioner's motion to remove the case from the summary calendar and to permit oral argument. (Appendix "E")

On April 26, 1972, the Court of Appeals for the Fifth Circuit per curiam denied appellant's petition for rehearing and for rehearing en banc. (Appendix "F")

JURISDICTION

The judgment of the United States Court of Appeals was entered on March 7, 1972, and petition for rehearing denied on April 26, 1972.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether a District Court erred in granting summary judgment against plaintiff who sought the recovery under 28 U.S.C. §1346(a)(1) of gift taxes claimed to have been erroneously collected for the years 1961 and 1962 where there were these genuine issues of material fact:

   a. Plaintiff asserts that certain valuable securities disclaimed by David H. Bishop subsequent to the death of his wife were securities owned by his wife at the time of her death, were never his property, and that consequently he incurred no gift tax obligation in executing the disclaimers.

The United States rejects plaintiff's position and asserts the securities were not in fact the property of Mrs. Bishop but rather were securities held by husband and wife as joint tenants which, upon the death of Mrs. Bishop, became wholly the property of her surviving husband.

b. Plaintiff asserts that because the Internal Revenue Service had full knowledge within the three-year limiting period of the transactions on which the gift tax assessments for 1961 and 1962 were based, assessment in 1966 of additional gift taxes for 1961 and 1962 was barred by the three-year statute of limitations. 26 U.S.C. §6501 (a).

The United States denies such knowledge on the part of the Internal Revenue Service as would invoke the three-year limiting period.

The court below affirmed the summary judgment and plaintiff was prevented from going to trial on these issues.

2. Whether the lower court erred in placing plaintiff's appeal on its summary calendar, in denying plaintiff an opportunity of oral argument, and in affirming the District Court without opinion, thus

leaving uncorrected erroneous findings of fact and conclusions of law which plaintiff has pointed out appear in the District Court opinion.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution:

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code:

26 United States Code (Internal Revenue Code of 1954)

§2056. Bequests, etc., To Surviving Spouse. . .

(d) DISCLAIMERS.--

(1) BY SURVIVING SPOUSE.--If under this section an interest would, in the absence of a disclaimer by the surviving spouse, be considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse, then such interest shall, for the purposes of this section, be considered as passing to the person or persons entitled to receive such interest as a result of the disclaimer. . .

(e) DEFINITION.--For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if--

(1) such interest is bequeathed or devised to such person by the decedent; . . .

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed

such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; . . .

* * *

§6501. Limitations on Assessment and Collection.

(a) GENERAL RULE.--Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. . .

(e) SUBSTANTIAL OMISSION OF ITEMS.--Except as otherwise provided in subsection (c)--. . .

(2) ESTATE AND GIFT TAXES.--In the case of a return of estate tax under chapter 11 or a return of gift tax under chapter 12, if the taxpayer omits from the gross estate or from the total amount of the gifts made during the year items includible in such gross estate or such total gifts, as the case may be, as

exceed in amount 25 percent of the gross estate stated in the return or the total amount of gifts stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. In determining the items omitted from the gross estate or the total gifts, there shall not be taken into account any item which is omitted from the gross estate or from the total gifts stated in the return if such item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item.

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28 United States Code

§1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

* * *

§1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; . . .

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in

the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Local Rules of the United States Court of Appeals for the Fifth Circuit

Rule 18. Summary Calendar

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

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CHAPTER 5

POWERS

Sections
672-71. Release of powers of appointment—title of act.
672-72. Definitions.
672-73. Right of release.
672-74. Manner of effecting release.
672-75. Release heretofore made.
672-76. Right of release not exclusive.
672-77. Delivery of release or copy to person in possession or control of property.
672-78. Recordation, etc., as notice to purchaser or mortgagee of property.
672-79. Recordation in deed book; indexing, fee.
672-80. Release not invalid for failure to comply with sections 672-77 and 672-78.
672-81. Conflicting provisions.

§ 672-71. Release of powers of appointment—title of act.

This act be cited as the "Release of Power of Appointment Act."

SOURCES: Laws, 1946, ch. 405, § 1.

REFERENCES: 41 Am Jur 874, Powers §§ 95 et seq.

Annotations

Release of power of appointment of property. 76 ALR 1430.

§ 672-72. Definitions.

When used in this act unless the context otherwise requires:

(a) "Power" includes any power to appoint or designate to whom property shall go, any power to invade property, any power to alter, amend or revoke any instrument under which an estate or trust is held or created or to terminate any right or interest thereunder, and any power remaining where one or more partial releases have heretofore or hereafter been made with respect to a power, whether heretofore or hereafter created or reserved, whether vested, contingent or conditional, and whether classified in law or known as a power in gross, a power appendant, a power appurtenant, a collateral power, a general, special or limited power, or exclusive or nonexclusive power, or otherwise, and irrespective of when, in what manner, or in whose favor, it may be exercised.

(b) "Donee" means any person whether resident or non-resident of this state, who, either alone or with another, has the right to exercise a power.

(c) "Objects" when used in connection with a power means the person in whose favor the power may be exercised.

(d) "Property" when used in connection with a power means any and all property, whether real or personal, any and all interest in property, and any and all income from property, which is subject to the power, and includes any part of the property, any part of the interest in property, and any part of the income from property.

(e) "Release" means renunciation, relinquishment, surrender, refusal to accept, extinguishment, and any other form of release.

SOURCES: Laws, 1946, ch. 405, § 2.

REFERENCES: 41 Am Jur 806, Powers §§ 2 et seq.

§ 672-73. Right to release.

Unless the instrument creating the power specifically provides to the contrary, the donee of a power, whether now existing or hereafter created, may;

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(a) At any time completely release his power.

(b) At any time or times release his power: (one) As to any property which is subject thereto; (two) As to any one or more of the objects thereof; or (three) So as to limit in any other respect the extent to which it may be exercised.

SOURCES: Laws, 1946, ch. 405, § 3.

REFERENCES: 41 Am Jur 874, Powers §§ 95 et seq.

Annotations

Release of power of appointment of property. 76 ALR 1430.

§ 672–74. Manner of effecting release.

A release of a power whether partial or complete shall be valid and effective, with or without a consideration, when the donee executes an instrument evidencing an intent to make the release, signed and acknowledged in the manner prescribed for the execution of deeds, and delivers the instrument or causes it to be delivered, either:

(a) To an adult person who may take any of the property which is subject to the power in the event of its non-exercise or to one in whose favor it may be exercised after such partial release; or

(b) To any trustee or any co-trustee of the property which is subject to the power; or

(c) By filing the same for recordation in the chancery clerk's office in the county and judicial district thereof in which any of the property is located or in which either the donee or the trustee in control of the property resides or in which the trustee has its principal office, or in which the instrument creating the power is probated or recorded.

SOURCES: Laws, 1946, ch. 405, § 4.

REFERENCES: 41 Am Jur 876, Powers § 97.

Annotations

Release of power of appointment of property. 76 ALR 1430.

§ 672–75. Release heretofore made.

A release of a power executed prior to the effective date of this act shall have the same effect as if this act had been in effect at the time the release was executed and delivered.

SOURCES: Laws, 1946, ch. 405, § 5.

§ 672–76. Right of release not exclusive.

The rights and means provided for in this act for the release of a power are not exclusive, but are in addition to all other rights and means of a donee to release a power in whole or in part.

SOURCES: Laws, 1946, ch. 405, § 6.

REFERENCES: 41 Am Jur 876, Powers §§ 97 et seq.

§ 672–77. Delivery of release or copy to person in possession or control of property.

Any fiduciary or other person, association or corporation having the possession or control of any property subject to a power of appointment shall be deemed to have notice of a release of the power when the original or a copy of the release is delivered to such fiduciary or other person, association or corporation.

SOURCES: Laws, 1946, ch. 405, § 7.

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§ 672–78. Recordation, etc., as notice to purchaser or mortgagee of property.

Any purchaser or mortgagee of real property subject to a power of appointment who is without actual notice shall be deemed to have notice of a release of the power when the original or duplicate original is filed for record in the chancery clerk's office in the county and judicial district thereof in which the particular real property so purchased or mortgaged is located, and when the deed, will or other instrument creating the power, or a duly attested copy thereof, is recorded in the same office, and an appropriate notation is entered on the margin of the will or deed book where the instrument creating the power is recorded referring to the deed book and page where the release is recorded.

SOURCES: Laws, 1946, ch. 405, § 8.

CROSS REFERENCES: Land and Conveyances §§ 867–869, 878, 881.

§ 672–79. Recordation in deed book; indexing, fee.

Clerks of chancery courts are authorized and directed to record releases of powers of appointment in the books provided for the recordation of deeds and to index the same in the current and general indexes, the name of the donee being entered on the grantor index, and to charge therefor at the rate applicable to deeds.

SOURCES: Laws, 1946, ch. 405, § 9.

CROSS REFERENCES: Fees § 3932; Land and Conveyances §§ 878, 881.

§ 672–80. Release not invalid for failure to comply with sections 672–77 and 672–78.

No release shall be invalid or ineffective because of failure to comply with either § 7 or § 8 [§ 672–77 or § 672–78] of this act.

SOURCES: Laws, 1946, ch. 405, § 10.

§ 672–81. Conflicting provisions.

In so far as the provisions of this act may conflict with other acts or parts thereof, the provisions of this act shall control.

SOURCES: Laws, 1946, ch. 405, § 11.

STATEMENT

Dr. David H. Bishop and his wife Mary H. Bishop resided for many years at Oxford, Mississippi, where Dr. Bishop was engaged as an English professor at the University of Mississippi. Mrs. Bishop died October 3, 1961, at the age of 76 years. Dr. Bishop died January 9, 1963, at the age of 92 years. Dr. and Mrs. Bishop were survived by three daughters: Vasser Bishop, Mary Hartwell B. Howorth, and Martha B. Henton.

During their lifetimes Dr. and Mrs. Bishop accumulated securities and cash in modest quantities. In 1950 they bought a residence--the only one they ever owned--for $13,000. They received the property as tenants in common. (R. 218-219)

Certain of the securities which Dr. and Mrs. Bishop held at the time of Mrs. Bishop's death were directly traceable to inheritances of Mrs. Bishop from her parents. These items were listed at their full value in Mrs. Bishop's estate tax return. (R. 91)

At the time of Mrs. Bishop's death, all securities owned by Dr. and Mrs. Bishop were registered in both their names as joint tenants with the right of survivorship.

Plaintiff asserts, however, that

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despite the form of the registration, the securities were in fact owned by Dr. and Mrs. Bishop equally--as tenants in common, not as joint tenants. The record supports her position.

Death of Mrs. Bishop

Shortly after Mrs. Bishop's death on October 3, 1961, Dr. Bishop engaged Lomax B. Lamb, Jr., an attorney, to represent him in legal matters involved in the administration of Mrs. Bishop's estate. The administration proceeded normally, and lists of assets were prepared. (R. 267-268) Dr. Bishop early in his conversations with his attorney said he wished some of the securities which he and his wife had owned together to go to his daughters and grandchildren. (R. 176) He also indicated that he didn't consider those assets his wife had obtained from her family truly his; he felt they should go to their daughters. (R. 248-249)

Dr. Bishop was informed by his attorney that under the Internal Revenue Code he might disclaim any or all of his inheritance from his wife. As a result of these disclaimers, Dr. Bishop directed his attorney to prepare instruments disclaiming a number of shares of stock. These shares were never registered in the name of Dr. Bishop individually, but were released by him and divided among the three daughters. (R. 176, 273)

The original disclaimer was executed on November 27, 1961, (R. 58), and listed securities with a valuation of some $67,137.40. (R. 189) A supplemental disclaimer was executed on January 29, 1962, covering additional securities valued at some $27,182.26. (R. 72, 191)

The disclaimers recited that it was the intention of Dr. Bishop "to comply with the terms of §2056(d) of the Internal Revenue Code of 1954 which is concerned with disclaimers, and with §§672-71 through 672-81, Mississippi Code of 1942, which provides for the release of powers of appointment." (R. 59, 72)

Dr. Bishop also made certain gifts of stock and cash to the First National Bank of Memphis as Trustee for the benefit of his daughters, grandchildren, and his sons-in-law. The first gifts after Mrs. Bishop's death were made on November 27, 1961, and amounted to approximately $63,000. On January 29, 1962, additional gifts were made in trust amounting to some $27,000. (R. 61, 66)

On January 30, 1962, Dr. Bishop filed a gift tax return for the calendar year 1961. (R. 68) On February 26, 1963, a gift tax return for the calendar year 1962 was filed for Dr. Bishop, deceased, by Vasser Bishop, his executrix. (R. 117)

No reference was made in either the 1961 or the 1962 gift tax returns to the

stocks which were a part of the estate of Mrs. Mary H. Bishop and which were dealt with in Dr. Bishop's two disclaimers.

On February 21, 1962, an estate tax return was filed by Dr. Bishop, executor, in connection with his wife's death. (R. 74) On Schedule "M" of the return he gave a full account of the written disclaimer and supplement executed by him and filed in the office of the Chancery Clerk of Lafayette County, Mississippi, along with a complete list of all stocks disclaimed and released to his daughters, contingent legatees of Mrs. Bishop. (R. 105)

I. R. S. Fully Reviewed Gift Tax Liability in 1963

The estate tax return of Mrs. Bishop was audited by the Internal Revenue Service in 1963. Felix J. Underwood, Jr., Estate Tax Examiner for the Internal Revenue Service, in a letter of July 11, 1963, opened correspondence about the examination of the return. (R. 29-30, 401)

Letters, telephone calls, personal interviews involving Mr. Underwood for the Internal Revenue Service and Lomax Lamb, Jr., for the Bishop estate followed for several months, during which the gift tax consequences of the securities disclaimed by Dr. Bishop were fully explored. (R. 30, 306, 307, 403, 406)

In a letter dated December 30, 1963, Underwood wrote Lamb saying he had submitted his report of the examination of the estate tax return for the estate of Mrs. Mary H. Bishop. That letter spoke of the unresolved doubt

> ". . . in the examiner's mind as to whether or not the surviving spouse, Dr. David H. Bishop, may legally disclaim his one-half earned interest in the stocks in which he and decedent were joint tenants with the right of survivorship. . . However, Dr. Bishop died in 1963 and the examiner is going to research this matter further and determine if his right to disclaim or not disclaim his interest in the jointly held stocks will affect his estate tax liability, or whether or not he incurred any gift tax liability if the disclaiming of such jointly held stock was legally improper." (R. 30, 128) (Emphasis supplied.)

On January 28, 1964, Lamb spoke to Underwood again on this subject. (R. 308, 399-400)

I. R. S. Rejected Additional Assessments in 1964

In a letter of March 20, 1964, J. G. Martin, Jr., District Director of Internal Revenue, sent Vasser Bishop, executrix, a final report letter covering the examination of returns in the estate

of Mrs. Bishop. Specific reference was made to the disclaimers by Dr. Bishop--and their effect on Mrs. Bishop's estate tax liability. (R. 128a, 128d-128e)

I. R. S. Reversed Itself in 1966

On November 18, 1966, the Internal Revenue Service assessed additional gift taxes against the estate of David H. Bishop on the grounds that the actions of Dr. Bishop in 1961 and 1962 in disclaiming stocks should have been reported as gifts, and gift taxes paid on the stocks disclaimed. (R. 187, 309-310)

Executrix Paid 1966 Assessments

Vasser Bishop, executrix, paid the 1966 assessments. The first count of her complaint seeks recovery of $11,089.72, including interest, she paid on the 1961 gift tax assessment.

In her second count she seeks recovery of $8,267.98 paid on the assessment for 1962 gift taxes.

The District Court had jurisdiction of the action by reason of 28 U.S.C. §1346(a)(1).

REASONS FOR GRANTING THE WRIT

I.

OWNERSHIP OF SECURITIES REGISTERED IN THE NAMES OF DR. AND MRS. BISHOP AT THE TIME OF MRS. BISHOP'S DEATH IS A DISPUTED QUESTION OF FACT. THE DISTRICT COURT ERRED IN NOT ALLOWING A JURY TO MAKE A DETERMINATION WITH RESPECT TO OWNERSHIP.

After the pleadings had been settled in the District Court and the United States had taken the depositions of Vasser Bishop and Lomax B. Lamb, Jr., plaintiff filed a motion for summary judgment under Rule 56. (R. 312) The particular ground of the motion was that collection of the additional gift taxes for 1961 and 1962 was barred by the three-year statute of limitations.

The United States responded with a cross-motion for summary judgment. (R. 314) The motion was accompanied by no supporting affidavits, and perforce had to stand on the pleadings, depositions, answers to interrogatories and admissions on file.

The only real evidence on which the motion of the United States could rely was the admitted fact that on the date of Mrs. Bishop's death the securities here involved were registered in the name of

Mrs. Bishop and her husband as joint tenants with right of survivorship.

But all other materials in the case which were properly before the District Court for its consideration supported the position taken by plaintiff that Dr. and Mrs. Bishop each owned the securities in equal shares--as tenants in common rather than as joint tenants.

--That is the meaning of the language in plaintiff's complaint when she said the securities disclaimed were not the property of her father. (R. 6, 8)

--That is the meaning of plaintiff's answers to interrogatories from the United States where she said several times that the securities disclaimed were securities which Mrs. Bishop inherited from her parents, which Dr. Bishop considered to belong to his wife and declined to accept, or securities whose ownership was attributable to Mrs. Bishop. (R. 26-39)

--Dr. Bishop's entirely handwritten will dated November 8, 1958, specifically stated that "all our material possessions are owned in common by my wife and myself, share and share alike. . . I will that my equal share of these at my death shall pass to the entire possession of my wife. . ." (R. 53)

--The language of the disclaimers executed by Dr. Bishop explicitly stated that he and his wife "owned all their

interests in corporations listed below equally." (R. 58, 72)

--And the testimony of Lomax B. Lamb, Jr., attorney, taken by the United States, documented plaintiff's position that Dr. Bishop consistently declared he and Mrs. Bishop owned their securities in equal shares--share and share alike. (R. 175, 271, 291)

On the basis of this record, it was error to grant summary judgment on the cross-motion of the United States. As the moving party, the United States had the burden of showing the absence of a genuine issue as to any material fact. The proper evidentiary material before the court must be viewed in the light most favorable to Vasser Bishop, as executrix.

Adickes v. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)

United States v. Diebold, 369 U.S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)

6 Moore, Federal Practice (2d ed. 1966) §56.13(3)

In that light Dr. and Mrs. Bishop at the time of her death owned their securities as tenants in common, not as joint tenants. Those securities disclaimed were either securities which Mrs. Bishop

inherited from her family and in which Dr. Bishop felt he had no proprietorship rights, or securities the ownership of which was attributable solely to Mrs. Bishop.

There is no legal impediment to giving effect to the views of Dr. and Mrs. Bishop with respect to their equal ownership of securities despite the form of registration. Under similar circumstances the Mississippi Supreme Court has held that the determination of ownership is a question of fact, not of law. One must determine the intent of the parties.

Keyes v. Keyes, 252 Miss. 138, 171 So. 2d 489 (Miss. 1965) (Series E. Government "co-owner" bonds registered in name of husband and wife were involved)

Petersen v. Petersen, 238 Miss. 190, 118 So. 2d 300 (Miss. 1960) (common stock in corporation registered in name of husband and wife as joint tenants with the right of survivorship)

Harrell v. Harrell, 231 So. 2d 793 (Miss. 1970) (joint savings account registered in name of husband and wife)

O'Connor v. Dickerson, 188 So. 2d 241 (Miss. 1966) (joint tenancy in real estate terminated where joint owners had executed option

contract and one of joint owners died before deed executed by both to option-holder who exercised option. Intention to terminate joint tenancy found from language of option contract)

Bird v. Stein, (S.D. Miss., 1952) 102 F. Supp. 399, rev'd on another point (C. A. 5, 1953) 204 F. 2d 122, reh. den. (1953) 205 F. 2d 512 (certain real property was acquired by husband and wife as joint tenants. Husband, who died first, disposed of it in his will. Wife accepted will of husband and by her actions after death of husband nullified joint tenancy conveyance she and husband had received)

See Bradley v. State of New Hampshire (S. Ct. N. H., 1956) 123 A. 2d 148. (right of surviving joint tenant to renounce stock recognized)

When the issue has been before it, the Mississippi Supreme Court has consistently held that the form of a joint tenancy or co-owner registration is not controlling with respect to true ownership of both real and personal property. A factual inquiry into the intent of parties must be made.

The United States relied on the form of registration to support its motion in

the District Court.

The District Court relied on the form of registration to grant summary judgment to the United States. In removing the issue of ownership from a jury determination, the District Court erred. Plaintiff's writ should be granted so that this court may direct the District Court to proceed with a trial of the factual issue.

The Federal case of Robertson v. United States, (D.C. Ala. 1968) 281 F. Supp. 955, illustrates a proper way to resolve ownership issues where stocks valued at $584,148.98 were registered in the names of two brothers as joint tenants with right of survivorship. After the death of one brother and prior to the filing of his estate tax return, the surviving brother disclaimed one-half of the securities.

The District Court concluded from the facts in evidence and permissible inferences to be drawn therefrom that the joint tenancy was severed, terminated or abandoned prior to the death of the decedent either by the agreement of the brothers or by their conduct in devoting the securities to their partnership business. With the termination of the joint tenancy, the property interests of the brothers were converted into a tenancy in common.

Vasser Bishop is prepared to submit

her case to a jury and allow a jury to determine this important factual question. Justice is not served when she is deprived of this right.

II.

THE INTERNAL REVENUE SERVICE WITH FULL KNOWLEDGE OF ALL MATERIAL FACTS MADE A DETERMINATION WITHIN THREE YEARS AFTER DR. BISHOP'S 1961 AND 1962 GIFT TAX RETURNS WERE FILED THAT NO GIFT TAX LIABILITY WAS INCURRED IN CONNECTION WITH HIS DISCLAIMER OF SECURITIES OWNED BY HIS WIFE. THE DISTRICT COURT ERRED IN NOT GRANTING VASSER BISHOP'S MOTION FOR SUMMARY JUDGMENT.

Vasser Bishop's motion for summary judgment (R. 312) stated clearly it was predicated on the application of the three-year statute of limitations. §6501(a), Internal Revenue Code of 1954.

The deposition of Lomax B. Lamb, Jr., taken by the United States, relates in detail the exchange of information between the United States and plaintiff's attorney regarding the disclaimers of Dr. Bishop. (R. 302-310) This exchange occurred in 1963 and early 1964, well within the three year period from the time the gift tax returns were filed in 1962 and 1963. The assessment and payment on which this suit is based was not made until November 18, 1966. (R. 310)

The chronology of conversations, correspondence, and interviews in connection with the disclaimers is also related in Vasser Bishop's answers to interrogatories propounded by the United States. (R. 29-31, 33-35, 37-39)

The complaint in this case alleges that the Internal Revenue Service had full knowledge of the disclaimers by Dr. Bishop in February, 1962, and took no action until 1966. (R. 6, 8)

The United States filed no affidavits or other evidentiary material to counter the materials of plaintiff.

Under the principles governing the application of Rule 56(e) it would have been entirely appropriate for the District Court to grant plaintiff's motion. The United States could not rest simply on its answer, but it was required by affidavit or otherwise to set forth specific facts showing there is a genuine issue for trial.

Vasser Bishop can speculate that a factual issue might be raised by the United States with respect to the authority of Felix J. Underwood, Jr., to speak for the Internal Revenue Service on matters involving Dr. Bishop's gift tax liability as well as his liability as executor of the estate of Mrs. Bishop. In 1963 and 1964 Mr. Underwood was Senior Gift Tax Examiner for the Internal Revenue Service in Mississippi as well as

its senior estate tax examiner. He wore two hats, not just one. (R. 399-400) She is prepared to try this issue if so directed--and permitted.

But the District Court in denying plaintiff's motion for summary judgment and granting the cross-motion of the United States on materials then before it departed from the accepted and usual course of judicial proceedings.

The Court of Appeals for the Fifth Circuit sanctioned such departure by the District Court when it affirmed the judgment of the District Court. Action by both lower courts in this case, plaintiff submits, calls for an exercise of this court's power of supervision.

III.

THIS COURT SHOULD GRANT CERTIORARI TO SETTLE THE QUESTION OF WHETHER DISPOSITION OF THIS CASE BY THE DISTRICT COURT WITHOUT TRIAL AND BY THE LOWER COURT ON ITS SUMMARY CALENDAR AND WITHOUT ORAL ARGUMENT OR WRITTEN OPINION CONSTITUTES A VIOLATION OF DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AMENDMENT.

Plaintiff has already discussed reasons she believes the lower court erred in not granting her motion for summary judgment or a trial on the disputed issue of fact regarding ownership of the

securities disclaimed by Dr. Bishop.

On appeal, after learning that the case had been assigned to the summary calendar of the lower court, plaintiff moved to remove the case from the summary docket and to permit oral argument. This motion was denied after the lower court had already issued its order affirming the District Court. (Appendix "E")

Plaintiff sympathizes with the lower court in its efforts to seek ways to expedite disposition of appeals. Its opinion in the case of Isbell Enterprises, Inc. v. Citizens Casualty Co., et al., (CCA 5, 1970) 431 F. 2d 409, related its experience in judicial screening of cases under its Rule 18.

The office of the Clerk for the Fifth Circuit Court of Appeals writes that no officially published statistics have appeared since Isbell, but that, in fiscal year 1971, 652 cases were placed on the summary calendar, with 776 cases argued orally. The trend towards summary disposition is thus accelerating.

Not all appellate tribunals view the summary arrangement with equal satisfaction. In SEC v. Texas Gulf Sulphur Co., (CCA 2, 1971) 446 F. 2d 1301, the Second Circuit indicated its reservations about limiting oral argument on an original three-judge hearing.

The opinion of the District Court contained errors which plaintiff believes she might have clarified with oral argument to the lower court. (E.g., the District Court misread the language of the disclaimer supplement of January 29, 1962. Compare R. 72 and 321) That erroneous conclusion on a significant point may well have determined the decision on appeal. Now, without a written opinion on appeal, the statement in the District Court opinion goes uncorrected.

On the facts of this case, plaintiff submits that the summary judgment granted by the District Court and the summary disposition of her appeal by the lower court failed to accord plaintiff due process.

Plaintiff recognizes that due process of law under the Fifth Amendment "has never been a term of fixed and invariable content," requiring oral argument in every instance.

> F.C.C. v. WJR, 337 U.S. 265, 275, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949)

Injustice did result here, plaintiff submits, and she requests that a writ of certiorari be granted so that the Fifth Amendment due process issue can be determined in her case and also, perhaps, that general guidelines can be given for use of the summary calendar by the lower court.

CONCLUSION

For the reasons stated, Vasser Bishop respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Lomax B. Lamb, Jr.

Lomax B. Lamb, Jr.
Attorney for Vasser
Bishop, Executrix of the
Estate of David H. Bishop
Plaintiff-Appellant

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executrix for 1962 made no mention of disclaimers, which exceeded 25% of reported gifts, deficiency assessments made July 25, 1966 not barred by 3-year period of limitations. Fact that while examining husband's estate tax return IRS agent received knowledge of disclaimers immaterial. Since disclosure was not made on gift tax returns or attached statements, 6-year period of limitations applies. *Reference:* 1970 P-H Fed. ¶ 126,354.2.

Lomax Lamb, P.O. Box 352, Marks, Miss., Lowell E. Grisham, Thomas R. Ethridge, Oxford, Miss., Attys. for Plaintiff.

Jack D. Warren, Refund Trial Sec. No. 2, Dept. of Justice, Wash., D.C., H. M. Ray, U.S. Atty., P.O. Box 191, Oxford, Miss., for Defendant.

Memorandum Opinion

SMITH, District Judge:

This case is before the Court on plaintiff's Motion For Summary Judgment and on defendant's Cross-Motion For A Summary Judgment on the First and Second Counts of the complaint. The Third Count of the complaint is not involved in either of the motions aforesaid.

Dr. David H. Bishop and his wife, Mary H. Bishop resided for many years at Oxford, Mississippi, where Dr. Bishop was engaged as a professor at the University of Mississippi. Mrs. Bishop died October 3, 1961 at the age of 76 years. Dr. Bishop died January 9, 1965, at the age of 92 years.

Mrs. Bishop[1] left a Last Will and Testament by which she devised and bequeathed her estate to Dr. Bishop, should he survive her, if not, to her three daughters.[2]

Dr. Bishop, as the executor of his wife's estate, filed an Estate Tax Return (Form 706) with the Jackson, Mississippi Office of the Internal Revenue Service on February 21, 1962. In Schedule E (Jointly Owned Property) of the

[¶ 147,483]

Vasser BISHOP, as Executrix of the Estate of David H. Bishop, Deceased, PLAINTIFF v. U.S., DEFENDANT. U.S. District Court, N. Dist. of Miss., W. Div., No. 6943-S, July 1, 1970. Decision for Govt.

1. GIFT TAX—Transfers in general—transfers subject to gift tax. Husband's transfer of securities to daughters, who were contingent legatees, in accordance with disclaimer of wife's bequest of jointly-held securities, is taxable gift. No evidence that joint tenancy was severed during wife's lifetime; securities passed to husband by survivorship and not by bequest. *Reference:* 1970 P-H Fed. ¶ 125.112(30).

2. ESTATE AND GIFT TAX PROCEDURE—Limitations—period for assessing and collecting—gift tax decisions on limitations on assessment and collection of taxes. When husband, who died January 3, 1963, made disclaimers held to be taxable gifts, on November 27, 1961 and January 29, 1962, and gift tax returns filed by him for 1961 and by his

[1] Mrs. Bishop will be referred to in this opinion as the "Decedent".

[2] The pertinent parts of the decedent's will dated July 5, 1958, are:

"To my husband, David H. Bishop, I give my entire estate now in joint ownership of David H. Bishop and Mary R. Bishop with right of survivorship, appointing him executor.

In event my husband does not survive me I give my estate, not including home, to my daughters, Vasser Bishop, Mary Hartwell Howorth and Martha Bishop Henton, share and share alike, and name Vasser executrix.

To Vasser I leave the home."

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return, the Executor listed jointly owned and held stocks and bank accounts.[3] The schedule reflects that the Securities were held by the Decedent and Dr. Bishop as "joint tenants with the right of survivorship". The schedule contained two groups of Securities. One group, said to contain Securities inherited by Decedent from her mother, were listed at full value. The other group, said to have been acquired by the Decedent and Dr. Bishop through joint effort and contributions, were listed at one-half the full value. The total value of the Securities listed under Schedule E of the return was $166,929.21.

Schedule M (Bequests, etc., To Surviving Spouse—Marital Deduction) of the return lists the entire estate of the value of $172,929.21. The entire estate passed to Dr. Bishop by the Will of the Decedent. The Executor deducted from the value of the entire estate the sum of $82,838.25, representing the value of certain Securities said to have been disclaimed and released by Dr. Bishop to the contingent legatees of Decedent. The deduction of this amount left a total of $90,090.96, which amount was further reduced by federal and other death taxes payable out of the interest passing to Dr. Bishop, as the surviving spouse, under the Will. Thus, the net value of that part of the marital deduction, constituting property passing to Dr. Bishop as the surviving spouse, after deducting the value of the property disclaimed by him, amounted to $86,687.54.

Schedule O, the Recapitulation Schedule of the return, reflects an adjusted gross estate in the sum of $167,270.48. The Executor reduced this amount by one-half, or $83,635.24, the maximum marital deduction to which the estate was entitled.

The funeral expenses, administration expense and debts of the decedent amounted to $5,658.73. Thus, the total allowable deductions amounted to $89,293.97. Deducting this amount and the exemption of $60,000.00, resulted in a taxable estate of $23,635.24. The estate tax due on the return was $2,108.93.

On November 27, 1961, after the death of Mrs. Bishop, but before the estate return was filed, Dr. Bishop executed a disclaimer and release by which he undertook to disclaim and renounce any interest which he had, as the surviving registered joint owner, in a portion of the Securities shown in the Estate Tax Return and listed under Schedule E thereof.

In the disclaimer Dr. Bishop referred to the Securities covered thereby as being stocks inherited by Decedent from her parents. The disclaimer was executed in favor of the three daughters of Dr. Bishop and Decedent, contingent legatees of Decedent. The Securities, prior to Decedent's death, were held by her and her husband as joint tenants with the right of survivorship. The disclaimer recited that it was the intention of Dr. Bishop to comply with the provisions of Section 2056(d) of the Internal Revenue Code of 1954,[4] and Sec-

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[3] For convenience stocks and bank accounts will be sometime referred to in this opinion as "Securities".

[4] 26 U.S.C.A. § 2056(d). This subsection provides, in part:

"(d) Disclaimers.—

(1) By surviving spouse.—If under this section an interest would, in the absence of a disclaimer by the surviving spouse, be considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse, then such interest shall, for the purposes of this section, be considered as passing to the person or persons entitled to receive such interest as a result of the disclaimer."

See also 26 U.S.C.A. § 2056(e), in which its pertinent parts provide:

"(e) Definition.—For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

(1) such interest is bequeathed or devised to such person by the decedent;

(2) such interest is inherited by such person from the decedent;

* * * * * * * * * *

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release of nonexercise of such power; . . ."

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tions 672-71 through 672-81, Mississippi Code, 1942, Ann. Recompiled.[5]

Contemporaneously with the disclaimer Dr. Bishop transferred a portion of the Securities listed in Schedule E of the return to the First National Bank of Memphis in trust for the use and benefit of his three daughters. The aggregate value of these Securities was $63,000.00.

A short time later on January 29, 1962 Dr. Bishop executed a supplement to the original disclaimer, disclaiming and releasing to his said daughters, any interest which he had, as surviving registered joint owner and as legatee of decedent, in a portion of the securities shown on Schedule E of the return. Unlike the original disclaimer the supplement thereto described the Securities therein disclaimed as stocks owned equally by Dr. Bishop and Decedent.

Contemporaneously with the execution of the supplement to the original disclaimer, Dr. Bishop transferred additional Securities of the value of $27,000.00 to the First National Bank of Memphis to be held and administered under the trust indenture hereinbefore mentioned. The disclaimers were executed and recorded in all respects as required by Mississippi Statutes. (Release Of Powers Of Appointment Act, Mississippi Code, 1942, Ann., Recompiled §§ 672-71 et seq.)

As has been hereinbefore mentioned, subsequent to the execution of the disclaimers, on February 21, 1962, Dr. Bishop filed the Estate Tax Return for the estate of the Decedent. With reference to the deduction of $82,833.05 shown in Schedule M of the return, Dr. Bishop described the deduction as being justified in the language as follows:

> "By written instrument executed on November 27, 1961, and recorded in Book 314, at page 251, of Chancery records of Lafayette County, Mississippi, and a supplement thereto executed January 29, 1962, and recorded in Book at page , of the Chancery records of Lafayette County, Mississippi, surviving spouse disclaimed and released to contingent legatees of decedent the following stocks:"

On January 30, 1962, before the filing of the Estate Tax Return for the estate of Decedent, Dr. Bishop filed with the Jackson, Mississippi office of Internal Revenue Service a Gift Tax Return for the year 1961. Dr. Bishop included as a taxable gift for the calendar year 1961, the transfer of Securities amounting to $63,000.00 to the First National Bank of Memphis by his trust indenture of November 27, 1961. Dr. Bishop did not mention or in any way refer to the disclaimer of November 27, 1961, nor did he attach a statement to the return regarding such transaction. The return was entirely silent in regard to the disclaimer. After deducting the exclusions to which Dr. Bishop was entitled and the

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[5] Sections 672-72 and 672-73, Miss. Code 1942 Ann. Recompiled, provide:

"§ 672-72 Definitions.

When used in this act unless the context otherwise requires:

(a) 'Power' includes any power to appoint or designate to whom property shall go, any power to invade property, any power to alter, amend or revoke any instrument under which an estate or trust is held or created or to terminate any right or interest thereunder, and any power remaining where one or more partial releases have heretofore or hereafter been made with respect to a power, whether heretofore or hereafter created or reserved, whether vested, contingent or conditional and whether classified in law or known as a power in gross, a power appendant, a power appurtenant, a collateral power, a general, special or limited power, or exclusive or non-exclusive power, or otherwise, and irrespective of when, in what manner, or in whose favor, it may be exercised.

(b) 'Donee' means any person whether resident or nonresident of this state, who, either alone or with another, has the right to exercise a power.

(c) 'Objects' when used in connections with a power means the person in whose favor the power may be exercised.

(d) 'Property' when used in connection with a power means any and all property, whether real or personal, any and all interest in property, and any and all income from property, which is subject to the power, and includes any part of the property, any part of the interest in property, and any part of the income from property.

(e) 'Release' means renunciation, relinquishment, surrender, refusal to accept, extinguishment, and any other form of release".

"§ 672-73. Right to release.

Unless the instrument creating the power specifically provides to the contrary, the donee of a power, whether now existing or hereafter created, may:

(a) At any time completely release his power.

(b) At any time or times release his power: (one) As to any property which is subject thereto; (two) As to any one or more of the objects thereof; or (three) So as to limit in any other respect the extent to which it may be exercised."

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specific exemption of $30,000.00 there was no tax due by Dr. Bishop on the return for that year.

After Dr. Bishop's death plaintiff, as the Executrix of his estate, filed a gift tax return for the estate for the calendar year 1962. The return was filed with the Jackson, Mississippi office of the Internal Revenue Service on February 26, 1963. Plaintiff reported the additional Securities transferred by Dr. Bishop during 1962 to the First National Bank of Memphis under the trust indenture aforesaid, amounting to $27,000.00. After deducting the exclusions to which Dr. Bishop was entitled, the estate paid a tax of $165.00 on taxable gifts of the value of $6,000.00. The return for the calendar year 1962 omitted reference of any kind to the supplement to the disclaimer, which supplement was executed during the calendar year 1962.

The Estate Tax Return for decedent's estate was processed in the Jackson, Mississippi office by an Estate Tax Examiner.[6] In the course of examining the return, the Agent received knowledge of and reviewed the facts relative to the disclaimers executed by Dr. Bishop during the calendar years 1961 and 1962.

Pursuant to a prior request, copies of the disclaimers were sent to the Agent by the attorney for the estate. The disclaimers were discussed on several occasions by the agent and the attorney for the estate. Suffice it to say that the Agent charged with the responsibility of examining decedent's Estate Tax Return was fully informed in respect to the disclaimers.

In the District Director's closing letter on the Estate Tax Return he made reference to the disclaimers. It is important to note, however, as mentioned in a letter written on December 30, 1963 to the attorney of the estate by the agent that the disclaimers had no bearing on the estate liability. The maximum marital deduction was obtained in any event.

On July 5, 1966[7] the Commissioner made deficiency assessments of gift taxes for both years. The Commissioner included in the 1961 return the Securities disclaimed by Dr. Bishop on November 27, 1961, and included in the 1962 return the Securities disclaimed by him on January 29, 1962. The Commissioner held that the disclaimers executed by Dr. Bishop for the years in question constituted transfers of property by gift within the meaning of Section 2501 of the Internal Revenue Code of 1954,[8] and

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[6] The Estate Tax Examiner will be hereinafter referred as the "Agent".

[7] This date is more than three years after the Gift Tax Returns for the calendar years 1961 and 1962 were filed with the District Director.

[8] The federal statutes involved in the questions presented to the Court by the summary motions of the parties are as follows:
"Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 2501 [as amended by Sec. 4(d)(2) of the Act of 14, 1960, P.L. 86-779, 74 Stats. 998] Imposition of Tax.

(a) General Rule.—For the calendar year 1955 and each calendar year thereafter a tax, computed as provided in section 2502, is hereby imposed on the transfer of property by gift during such calendar year by an individual, resident or nonresident, except transfers of intangible property by a nonresident not a citizen of the United States and who was not engaged in business in the United States during such calendar year.

• • • • • • • • • • • • • •

Sec. 2511. Transfers in General.

(a) *Scope.*—Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to the transfer only if the property is situated within the United States.

• • • • • • • • • • • • • •

Sec. 6501 [as amended by Sec. 165(a) of the Excise Tax Technical Changes Act of 1958, P. L. 85-859, 72 State. 1275].
Limitations on Assessment and Collection

(a) *General Rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

• • • • • • • • • • • • • •

were therefore taxable gifts.

It is not disputed that the Securities which were the subject of the alleged disclaimers exceed in amount twenty five per cent of the total amount of gifts stated in the return for each of the calendar years 1961 and 1962. For this reason the District Director contended that the six-year rather than the three-year statute of limitations applied to the assessments.

The Securities involved were transferred from the joint ownership of Dr. Bishop and Decedent to the contingent legatees and were never transferred to Dr. Bishop after his wife's death, before being transferred to the contingent legatees.

Plaintiff paid the deficiency assessments. The amount of the assessment with interest on the 1961 return was $11,089.72. The amount of the assessment with interest on the 1962 return amounted to $8,267.98. After having paid the assessments plaintiff filed a timely claim for refund with the District Director, who disallowed the claim. Plaintiff has filed this action to recover the amount paid by her on the assessments aforesaid with statutory interest.

The pending motions present two questions for the Court's consideration. These are:

1. Whether the documents entitled "Disclaimer and Release" executed by Dr. Bishop in 1961 and 1962 constitute transfers of property by gift within the meaning of Section 2501 of the Internal Revenue Code of 1954.

2. Whether defendant's assessments of gift taxes and interest for calendar years 1961 and 1962 are governed by the three-year statute of limitation, or by the six-year statute of limitation.

The Court will discuss these questions in the order mentioned.

[1] ***Do the Documents Entitled "Disclaimer and Release" Executed by Dr. Bishop in 1961 and 1962 Constitute Transfers of Property by Gift Within the Meaning of Section 2501 of Internal Revenue Code of 1954?***

The statute imposes a tax "on the transfer of property by gift" by any individual. [26 U.S.C.A. § 2501(a)(1)] The tax imposed "shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible". [26 U.S.C.A. § 2511(a)].

The plaintiff contends and urges upon the Court that Dr. and Mrs. Bishop were equal, not joint, owners of the Securities. This contention is, of course, made in the very teeth of the actual estate created by the phraseology utilized when the Securities were issued. The estate created by the phraseology used is a joint estate with the right of survivorship, or rather an estate by the entirety, as the joint owners were husband and wife.[9] Regardless of the apparent estate created, plaintiff contends that the acts of the joint owners clearly demonstrate that they considered the estate as one in common.

Plaintiff urges upon the Court to support her contention that the statements made by Dr. Bishop in his Will that "all of our material possessions are owned in common by my wife and myself, share and share alike", and that

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(e) *Omission From Gross Income.*—Except as otherwise provided in subsection (c)—

. . . . . .

(2) *Estate and gift taxes.*—In the case of a return of estate tax under chapter 11, or a return of gift tax under chapter 12, if the taxpayer omits from the gross estate or from the total amount of the gifts made during the year items includible in such gross estate or such total gifts, as the case may be, as exceed in amount 25 percent of the gross estate stated in the return or the total amount of gifts stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. In determining the items omitted from the gross estate or the total gifts, there shall not be taken into account any item which is omitted from the gross estate or from the total gifts stated in the return if such item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item."

[9] Wolfe v. Wolfe, Miss. 1949, 42 So. 2d 438, the court said with regard to such estates:

"The common law favored joint tenancies. Under it a conveyance to two or more persons not husband and wife created a joint tenancy; if to husband and wife, an estate in entirety. To create an estate in common, it was necessary to add restrictive or explanatory words showing an intent to create such an estate." (42 So. 2d at 438, 439).

"the greater part of our estate is invested in stocks" show that Dr. and Mrs. Bishop intended to hold their securities as tenants in common, rather than as joint tenants.

Plaintiff also urges that the Court should consider as evidence of the common ownership of the stocks the fact that decedent undertook to dispose of her interest in the joint estate. In the Will Decedent provided: "To my husband, David H. Bishop, I give my entire estate now in joint ownership of David H. Bishop and Mary H. Bishop (the Decedent) with right of survivorship, appointing him executor".

There is a letter in the record, dated August 23, 1963, addressed to the attorney, handling the legal affairs of both estates, written by a representative of a stock firm who handled Dr. Bishop's stock account for many years prior to his death. The letter states that in connection with the account the writer dealt only with Dr. Bishop and not with the Decedent; that for many years before Decedent's death the account was carried in the name of both Dr. Bishop and Decedent, as joint tenants with the right of survivorship; that the firm required the joint tenancy form to be signed on all such accounts by both parties to the agreement, but did not make inquiry about the source of money used in the purchase of stocks for an account in joint tenancy; that Dr. Bishop referred to the account on many occasions as "our account", meaning the account of Dr. Bishop and Decedent; and that there was nothing in his dealings with Dr. Bishop which indicated other than Dr. Bishop considered that he and Decedent owned equal interests in the account, or that the joint tenancy registration was undertaken for any purpose other than convenience in the transfer of stocks upon the death of either spouse. This letter, as will be noted, does not contain any affirmative information that the intention of Dr. Bishop was other than that the stock, sold by the writer of the letter to Dr. Bishop, was to be held by Dr. Bishop and Decedent as joint tenants. The letter has no probative value in the case.

Plaintiff urges upon the Court to consider the fact that Dr. Bishop stated in the disclaimer executed by him on January 29, 1962 that he and his wife "owned all of their interests in corporations listed below equally"; also the fact that Dr. Bishop, in his discussions with the attorney for the estate after his wife's death, indicated that he was under the impression that he and decedent owned their Securities in equal shares—share and share alike, despite the fact that they were registered prior to her death in both their names as joint tenants. These expressions made by Dr. Bishop after his wife's death were self-serving, and, as such, cannot be considered by the Court.

In the final analysis the only competent evidence of probative value on the question of the severance of the joint estate held by the parties prior to decedent's death consists of statements made by them in their respective Wills. Note the above quotation from Dr. Bishop's Will. The decedent undertook in her Will to bequeath to Dr. Bishop the property held by her and Dr. Bishop in joint ownership with the right of survivorship, thus evidencing the fact that decedent believed that she held an interest in the joint estate which she could devise by her Will.

The Wills of Dr. Bishop and Decedent were holographic Wills, written in 1958, three years before the death of Decedent, yet neither Dr. Bishop or Decedent did anything before the death of Decedent to sever the joint estate.

It is recognized that "A joint tenancy may be terminated altogether by mutual agreement between the parties or by any conduct or course of dealing sufficient to indicate that all parties have mutually treated their interests as belonging to them in common".[10]

It is also recognized that "The severance must take place before the death of the cotenant who has alienated his interest, and before the remaining cotenant has become the owner of the whole by virtue of his right of survivorship, and, hence, where a conveyance by a cotenant does not take effect until after his death, there is no severance".[11]

In addition, "There can be no severance of a joint tenancy by devise, since the right of survivorship takes precedent thereof".[12]

[10] 48 C.J.S., Joint Tenancy, § 4, at 928.
[11] Id. at 928.
[12] Id. at 928.

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The case of Bird v. Stein[13] is apposite to the case sub judice. In Bird the husband and wife acquired a plantation as joint tenants, with the right of survivorship. Upon the husband's death his will and codicil thereto were probated. The testator undertook to set up a trust in his property. He designated a daughter and son as trustees to carry out the provisions of the trust. The wife lived for two years after the death of her husband, and left a will, which was never probated and did not become effective. The contents of the will were material to the case only in so far as they had evidentiary value.

The trustees claimed that the trust never came into existence because the property which the testator designated as trust property became the property of his wife as the surviving tenant of the joint estate. The trustee's son undertook to rent the property from his mother after his father's death, and after her death, from the heirs of the estate. The heirs brought suit against the trustee for an accounting under the trust.

The court stated that the first and major question to arise in the estate was "Did the deed by which the property was acquired create a joint tenancy with the right of survivorship, and if it did, was there a termination of it during the life of V. A. Stein (the husband)".[14] In stating the contention of the parties the court said:

> "Defendants urge it did so create and that it was not severed by conduct or otherwise. Plaintiffs say it did not create a joint tenancy under the Mississippi statute, but if it did it was severed and terminated during the lifetime of V. A. Stein by conduct and written instruments."[15]

In connection with the estate created by the deed the court said:

> "It is clear from the language of the deed that it was intended to create a joint tenancy and not tenants in common. More convincing language could not have been chosen, and from the entire language of the deed it is equally apparent that it was drawn by a lawyer or by one versed in legal phraseology. It must be assumed that the parties reduced to writing what they had in mind and what was intended when they chose this language. When a joint tenancy is created, the right of survivorship follows as an incident thereto. A joint tenancy can be created only by the acts of the parties and as known at common law required unity of time, title, interest and possession.
>
> • • • • •
>
> Therefore upon the death of V. A. Stein the fee-simple title vested in in Sarah Stein."[16]

The facts in Bird v. Stein, supra, show that the husband committed alone, during his lifetime, many acts of ownership over the property, and used it as a home for the family until his death. In his Last Will and Testament he undertook to devise to his wife for her life all of his right, title and interest in and to all of his property, both real, personal and mixed with the remainder in trust for his children and two named grandchildren. Shortly after executing his will, the husband executed a codicil bequeathing all of his personal property not theretofore sold to his son, one of the trustees named in his Will. When the Will was probated there was no real estate left and very little personalty. Counsel for plaintiffs contended that by this course of conduct of the husband, there was a severance of the joint tenancy. The Court held that "Conduct and dealing of course under some circumstances can sever such an estate",[17] citing 48 C.J.S., Joint Tenancy, § 4, at 927, 928.

In discussing whether the evidence in the case sustained a severance of the joint tenancy during the lifetime of the joint tenants the court said:

> "Usually and generally a severance which will defeat a joint tenancy means a separation of the interests of joint tenants, vesting of the interest of one, separated from the in-

[13] 102 F. Supp. 399, United States District Court for the Southern District of Miss., W. D. (1952).
[14] 102 F. Supp. 401.
[15] Id. at 401.
[16] Id. at 401, 402.
[17] Id. at 402.

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terest of the other, in some third person. Tindall v. Yeats, 392 Ill. 502, 64 N.E.2d 903. The course of dealing in this case fails to show that there was a severance or any intent for a severance."

* * * * *

. . . Under some facts there could be a severance by conduct which would amount to an estoppel and the statute of frauds would not apply. However, such conduct or course of dealing is not present in this case. A severance from a joint tenancy to a tenancy in common is not a conveyance when it arises from the course of dealing, but is simply a change from one form of ownership to that of another form and arises by operation of law."[18]

The court in Bird, also discussed at length the nature of an estate by the entirety. The holding of the court seems to be quite appropriate in the case sub judice, as the joint estate with the right of survivorship held by Dr. Bishop and Decedent in the Securities in question was in reality an estate by the entirety. The Bird court said:

"Counsel for defendants suggests but does not argue at length the most decisive and controlling point, which in my judgment, definitely settles the severance question. The conveyance here not only created a joint tenancy but also created an estate by the entirety and this is recognized by the statute of Mississippi and the decisions thereunder. In Sale v. Saunders, 24 Miss. 24, the Court said: 'The same words of conveyance which would make two other persons joint tenants, will make the husband and wife tenants of the entirety. Both are seized of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole."

An estate by the entirety consists of five unities: time, title, interest, possession and marriage, all of which must coexist, while a joint tenancy possesses all these except marriage. Frederick v. Southwick, 165 Pa. Super. 78, 67 A.2d 802.

For a most exhaustive collection of authorities on this point see, Words & Phrases, Vol. 15, p. 327. Under the authorities there cited and collated it is clear that upon the death of V. A. Stein, Sarah, 'simply continued, in virtue of the nature of the tenancy, to possess and own what she already had.' Lilly v. Smith, 7 Cir., 96 F.2d 341, 343 [21 AFTR 114]. In that case it was held that it is the conveyance to both of them, the husband and wife, that creates the estate which ripens into a fee-simple title upon the death of one. In the case at bar all five of the unities are present and under the Mississippi authority supra it follows that upon the death of V. A. Stein title to Little Hope Plantation vested in fee simple in Sarah Stein."[19]

In the case of Wolfe v. Wolfe,[20] the Mississippi Supreme Court considered the legal effect of two deeds. One deed conveyed certain real property "to Willis Wolfe and Della Wolfe and the survivor of them". The second deed conveyed other real property to the same parties making use of the phraseology as follows: "do hereby convey and warrant unto Willis Wolfe and his wife, Della Wolfe, and to the survivor of them."[21] In Wolfe the court said:

"We do not undertake to determine whether the estate created is one of joint tenancy or entirety. In either case the result is the same, the survivor took the entire property.[22]

. . . We think the deeds under consideration do manifest an intention to create an estate in joint tenancy and not an estate in common. The first conveys the property to the grantee 'and the survivor of them', the second conveys to them 'and to the survivor of them.' The two quoted expressions mean the same thing. The distinguishing and most important incident of title by joint tenancy is the doctrine of survivorship, *by force of which, upon the death of one joint tenant, the joint estate remains unimpaired with the survivor.* . . . If the grantees are held to be tenants in common, it is necessary to erase

[18] Id. at 403.
[19] Id. at 404.
[20] 42 So. 2d 438 (1949)
[21] Id. at 438.
[22] Id.

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and eliminate the quoted provisions from the deeds. No proper exercise of judicial power would permit that. It is impossible to have the right of survivorship in an estate in common." (Emphasis supplied)[23]

The Wolfe case dealt with real property. The case of Duling v. Duling's Estate[24] dealt with the contents of a safety deposit box. The court held that money in a lock box was owned by the decedent and another under a joint tenancy agreement, and that the money was no part of the estate of the decedent. The court said:

> "The trial court awarded $2,000 of the fund in question to Albert Duling upon the correct theory that the joint tenancy agreement controlled and that this fund was no part of the assets of the estate of Miss Duling."[25]

In Vaughn c. Vaughn, [26] another Mississippi case, the court considered the ownership of a promissory note and deed of trust which were payable to husband and wife. The opinion reveals that Vaughn, the decedent, during his lifetime, was engaged as a contractor. In the course of his work he constructed a church building. Vaughn made a loan to the church to finance the construction of the building. The church issued to Vaughn its note to evidence the debt and a deed of trust to secure payment of the note. The note and deed of trust were payable to Vaughn and his wife. The note was payable "to the order of E. J. Vaughn and (Mrs.) Inez Pickett Vaughn, or to the survivor of them." The beneficiary in the deed of trust was designated as "E. J. Vaughn and Mrs. Inez Pickett Vaughn, or the survivor of them". Vaughn retained both documents until his death, and did not deliver them to Mrs. Vaughn. They were among his effects at his demise. Mrs. Vaughn was appointed executrix of the estate. She accounted for the note and deed of trust as assets of the estate in the inventory and final account. Afterwards, Mrs. Vaughn filed an amended account, in which she asserted ownership to the note and deed of trust.

Two questions were involved in the case relative to the note and deed of trust. One question was whether the phraseology used in the documents was sufficient to create a joint tenancy with right of survivorship. The other question was whether delivery of the note and deed of trust by the church to Vaughn, who retained them in his possession until his death, was sufficient to vest a right of joint tenancy in Mrs. Vaughn. The court answered both questions in the affirmative. We are not concerned in the case sub judice with the latter question. In regard to the former the court said:

> "The words used in Wolfe are substantially similar to those in the instant note and deed of trust. We think the reasons expressed in that case are sound and apply here. In brief, the note and deed of trust used words which create a joint tenancy with right of survivorship.[27]
> * * * * * * *
> In brief, we conclude that the delivery of the note and deed of trust to one of the joint payees, E. J. Vaughn, constituted also a constructive delivery of these instruments to the other payee, the wife. Vaughn held these instruments both for himself and for the joint payee, his wife. Upon his death, she as the surviving joint tenant, became vested with full title to them. That part of the lower court's decree holding to the contrary is reversed, and title to the note and deed of trust are adjudged to be in Mrs. Vaughn."[28]

The effect of the court's holding was that the note and deed of trust did not become an asset or a part of the estate of the decedent.

In support of her contention that the Securities were held as tenants in common by Dr. Bishop and Decedent, rather than as joint tenants, plaintiff cites two Mississippi cases.[29] Both are domestic relations cases. In Keyes the husband sued the wife for a divorce. The trial

[23] Id. at 439.
[24] 52 So. 2d 39 (1951).
[25] Id. at 45.
[26] 118 So. 2d 620 (1960).
[27] 118 So. 2d 620, at 622.
[28] Id. at 623.
[29] Keyes v. Keyes, 252 Miss. 138, 171 So. 2d 489 (1965) and Petersen v. Petersen, 238 Miss. 190, 118 So. 2d 300 (1960).

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court awarded the husband a divorce and denied the wife any interest in property jointly owned by the parties. The property involved in the case included United States Government Series E Bonds in the sum of $20,000. The bonds were purchased by the husband from his personal funds but were issued in his name and that of his wife so that the bonds could have been surrendered for payment by either of them. The husband kept the bonds in his possession. The bonds were produced in court and reflected that they were co-owner bonds, payable to the husband or the wife. The court said:

> "The U. S. Government bonds were Series E Bonds and were what are commonly called co-owner bonds. They were payable to Harvey W. Keyes or Mignonne W. Keyes . . . As to the U. S. Government Series E Bonds, between two co-owners, it is a question of fact, not of law, as to the extent of the property interest of the co-owners. One co-owner may, as a matter of fact, be the sole owner, he may be half owner, or he may have some other fractional interest therein. Under the facts in this case, which show that the appellee purchased these bonds with his own funds and has had them in his possession since that time, he is the sole owner of the bonds. The chancellor was not in error in denying appellant any interest in these bonds. 31 Code of Federal Regulations, Money and Finance: Treasury § 315.13 (1949); United States v. Stock Yards Bank of Louisville, 231 F. 2d 628 [49 AFTR 486] (6 Cir., 1956)." [30]

In Keyes the court was concerned with government securities, which are, of necessity, governed by governmental regulations. In reaching a decision the court relied upon a Sixth Circuit case. United States v. Stockyards Bank of Louisville, 6 Cir. 1956, 231 R. 2d 628 [49 AFTR 486]

In that case the question of estate held in Series E United States Savings Bonds by co-owners was presented to the court for its decision. The court held:

> "This court has held that co-ownership by husband and wife of Series E Bonds is not the equivalent of tenancy by the entirety under state law, but rather is an estate the limitations and conditions of which are delineated by the terms of the contract and by federal law . . .
>
> For the same reasons that co-ownership cannot be equated to tenancy by the entirety, it cannot be equated to joint ownership. While co-ownership and joint ownership possess many of the same incidents, notably the right of survivorship, they are not the same. One of the important differences is that a co-owner may alone present the bond for redemption, receive payment in full, and thereby eliminate the other co-owner's interest in the bond, so far at least as the issuer is concerned. 31 Code Fed. Reg. § 315.45.
>
> As between two co-owners, however, the regulations as well as judicial decisions have recognized that the extent of the property interest of each is a question of fact, not of law. One co-owner may as a matter of fact be the sole owner of the bond; he may be a half owner; he may have some other fractional ownership." [31]

It is clear that Keyes is inapposite to the case sub judice for two apparent reasons. First, the case dealt with government bonds. The conditions upon which such bonds may be surrendered are determined by government regulations. The courts have held that ownership of such bonds is a question of fact, not of law. Secondly, Keyes involved questions arising during the lifetime of the co-owners. Such is not the case in the action sub judice.

Petersen affords plaintiff little comfort. Petersen, like Keyes involved a divorce action and the award of alimony and counsel fees to the wife. The evidence showed that the husband had acquired certain corporate stock, issued originally in his name only. Later the husband surrendered the stock and caused it to be reissued in his name and that of his wife, as joint tenants with the right of survivorship. The wife claimed that the husband made her a gift of a one-half interest in the stock. The trial court held on conflicting evidence that the husband made a valid gift of one-half of the stock in question to his wife. The Supreme Court affirmed the lower court holding on this issue. Plain-

[30] 171 So. 2d at 491.
[31] 231 F.2d 628 at 630, 631.

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tiff asserts that Petersen enunciates the Mississippi rule that the extent of property interests of joint owners and co-owners in stock, bonds, and bank deposits is a question of fact, not of law. However, Petersen, like Keyes is inapposite to the case sub judice for the reason that the court in Petersen concerned the interest of joint tenants with the right of survivorship in the property while both tenants are living.

In the case sub judice Dr. Bishop simply continued, in virtue of the nature of the tenancy, to possess and own what he already had. Bird v. Stein, supra, at 404.

The Court finds that upon the death of Decedent, Dr. Bishop, as the surviving joint tenant, became the absolute and unqualified owner in fee simple of the Securities in question, by virtue of the death of Decedent, and not by virtue of Decedent's Will; that the said Securities did not pass from Decedent to the said surviving tenant, but rather the estate which the surviving tenant held jointly with Decedent ripened, by virtue of Decedent's death, into an absolute, unqualified fee simple estate for the surviving joint tenant, and, finally, that no interest in and to said Securities, at any time, became a part of Decedent's probate estate.

Plaintiff asserts that Dr. Bishop executed the disclaimers pursuant to the provisions of Section 2056(d) of the Internal Revenue Code of 1954, (See footnote 4) and Sections 672-71 through 672-81, Mississippi Code, 1942, Annotated, Recompiled (See footnote 5), for which reason, the disclaiming of any interest which he had in the Securities subject to the disclaimer, did not constitute a taxable gift within the meaning of 26 U.S.C.A. §§ 2501 and 2511. The provisions of 26 U.S.C.A. § 2056 apply to "Bequest, etc., to Surviving Spouse", and the allowance of the marital deduction. Section 2056(d) relates to disclaimers in relationship to the marital deduction, and has no application to taxable gifts.

The Internal Revenue Code of 1954, 26 U.S.C.A. § 2514, deals with powers of appointment and concerns transfers under the Gift Tax Chapter of the Code. Section 2514(b) provides:

"(b) Powers created after October 21, 1942.—The exercise or release of a general power of appointment created after October 21, 1942, shall be deemed a transfer of property by the individual possessing such power. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power."

Treasury Regulations Section 25.2511-1(c) provides:

"Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition of the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin."

The Mississippi "Release of Power of Appointment Act" (Footnote 5) provides for a release of a "power". The word "Power" is defined in the Act so as to include "any power to appoint or designate to whom property shall go". Section 672-72, Mississippi Code, 1942, Annotated, Recompiled. The Act has not been the subject of judicial interpretation by the Mississippi Supreme Court and this Court must give the Act the interpretation which he believes a Mississippi Court would give it.

The Court is of the opinion that the Act does not apply to the transfer of an interest in property which is owned absolutely and unqualifiedly by the person undertaking to release the power. The Act does not apply to absolute ownership.

The execution of the disclaimers by Dr. Bishop amounted to nothing more than a transfer of property owned al-

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solutely by him, and constituted, in the opinion of the Court, a transfer of property by gift, subjecting it to tax imposed by 26 U.S.C.A. § 2501.

[2] *Does the three or the six year statute of limitation govern the defendant's assessment of gift taxes for the calendar years 1961 and 1962?*

Having reached the conclusion that the execution by Dr. Bishop of the disclaimers in 1961 and 1962 constituted transfers of property by gift, the Court must decide whether the three or the six year statute of limitation applies to the assessments made by defendant.

It is undisputed that the assessments were made more than three but less than six years after the returns were filed. It is conceded that the value of the property disclaimed by Dr. Bishop in each of the years in question exceeded in amount twenty-five per cent of the total amount of gifts stated in the return. The sole question presented is whether the gifts represented by the disclaimers should be taken into account in determining whether gifts of an amount in excess of twenty-five per cent of the total amount of gifts stated in the return have been omitted from the gifts shown in the returns. If such gifts were disclosed in the return or in a statement attached thereto in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such gifts, the three year statute applies, otherwise, the six year statute applies, unless the information received by the agent in processing Decedent's Estate Tax Return apprised the Secretary or his delegate of the gifts represented by the disclaimer in such manner as to be legally acceptable in lieu of actual disclosure on the returns or in an attachment thereto.

It is conceded by plaintiff that no reference was made in either the 1961 or the 1962 return, or in any attachment to the same, to the disclaimers executed by Dr. Bishop.

Section 6501(e)(2), Title 26 U.S.C.A. (See footnote 8) provides in part "In determining the items omitted from . . . the total gifts, there shall not be taken into account any item which is omitted from . . . the total gifts stated in the return if such item is *disclosed in the return, or in a statement attached to the return,* in a manner adequate to apprise the Secretary or his delegate of the nature and amount of such item". (Emphasis supplied)

While conceding that the gifts represented by the disclaimers were not disclosed in the returns for the calendar years 1961 and 1962 or in any statement thereto, plaintiff asserts that defendant was not prejudiced thereby or placed at any disadvantage in the collection of the taxes. Plaintiff bottoms her argument on the assertion that the agent, charged with the responsibility of processing the Decedent's Estate Tax Return, acquired full knowledge of the disclaimers; and, after fully reviewing the matter, indicated positive acceptance and approval of the Gift and Estate Tax Returns as filed. The record does not show that the agent indicated positive acceptance and approval of the Gift Tax Returns. The record shows that the agent accepted and approved the Estate Tax Return, with a slight variation brought about by revaluation of stocks. The question of the validity or non-validity of the disclaimers was not material to a decision as to the acceptance or rejection of the Estate Tax Return. Whether the defendant did or did not acquiesce in the executor's position in regard to the disclaimers did not affect in any respect the tax liability on the return.

The record reflects, as has been hereinbefore detailed, that the agent knew of the disclaimers and received copies thereof during the period he was processing the Estate Tax Return. In his letter of December 30, 1963 to the attorney for the estate the agent indicated that since Dr. Bishop died in 1963, he was going to research the matter further and determine whether Dr. Bishop's right to disclaim or not disclaim his interest in the jointly held stocks would affect his estate tax liability, or whether or not he incurred any gift tax liability, if the disclaiming of such jointly held stocks was legally improper.

In the closing letter the director said that "The surviving spouse under the terms of the decedent's will inherited the entire estate and after disclaiming stocks with a value of $82,838.25 still received the maximum marital deduction". It is interesting to note, also in the closing letter the director said "The decedent's last will and testament and the passing of the jointly held property with the right of survivorship resulted in a residue as such not existing".

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It appears clear to the Court that defendant did not at any time before making the assessments precipitating this action, come to a conclusion on the question of whether the disclaimers executed by Dr. Bishop constituted the transfer of property by gift, thereby making the transfer subject to the gift tax.

Unless the information acquired in the examination of the decedent's Estate Tax Return satisfies the requirements of 26 U.S.C.A. § 6501(e)(2) with respect to disclosure of the nature and amount of each stock disclaimed, the six year statute of limitation must govern. At this point it is proper to note that the Gift Tax Returns were examined and processed by an agent different from the one processing the Estate Tax Return.

If the statute is applied as written, plaintiff's contentions must fail. The statute is not ambiguous. The language used in the statute is plain, simple and clear. The Court is not required to interpret the statute as it needs no interpretation.

The record in this case reflects that there was not a compliance with the statute. Dr. Bishop, when he filed the Gift Tax Return for 1961, and plaintiff, when she filed the return for 1962 for his estate, did not disclose the existence of the disclaimers in the returns, or in statements attached thereto. Thus should the matter end.

The Court has not found, nor has counsel cited, any reported case which holds a contrary view. Plaintiff calls the Court's attention to Colony v. Commissioner, 1958, 357 U.S. 28 [1 AFTR 2d 1894] 2 L ed 2d 1119; Phinney v. Chambers, 5 Cir. 1968, 392 F.2d 680 [21 AFTR 2d 651]; Taylor v. United States, 5 Cir. 1969, 417 F.2d 991 [24 AFTR 2d 69-5747], and Benderoff v. United States, 8 Cir. 1968, 398 F.2d 132 [22 AFTR 2d 5222].

In Colony the deficiencies were based upon the Commissioner's determination that the taxpayer understated the gross profits on sales of certain lots of land for residential purposes as a result of having overstated the "basis" of such lots by erroneously including in their cost certain unallowable items of development expense. There was no claim that the taxpayer had inaccurately reported its gross receipts, or that the returns were fraudulent. The Tax Court sustained the Commissioner. It held that substantial portions of the development costs were properly disallowed, and that these errors by the taxpayer had resulted in the understatement of the taxpayer's gross income by 77.2% and 30.7%, respectively, of the amounts reported for the taxable years 1946 and 1947. In addition the Tax Court held that in these circumstances the five-year period of limitation provided in Section 275(c) [The predecessor of 26 U.S.C.A. § 6501(e)(2)] was applicable. The critical language in the statute involved in the case was "omits from gross income an amount properly includible therein". In discussing the Commissioner's viewpoint that the draftsman's use of the word "amount" (instead of, for example, item) suggest a concentration on the quantitative aspects of the error, that is, whether or not gross income was understated by as much as twenty-five per cent, the court said:

> "This view is somewhat reinforced if in reading the above-quoted phrase one touches lightly on the word 'omits' and bears down hard on the words 'gross income,' for where a cost item is overstated, as in the case before us, gross income is affected to the same degree as when a gross receipt item of the same amount is completely omitted from a tax return."[32]

On the other hand, the taxpayer's viewpoint was that the Commissioner's reading fails to take full account of the word "omits", which Congress selected when it could have chosen another verb such as "reduces" or "understates", either of which would have pointed significantly in the Commissioner's direction. Relying on the ordinary and usual definition of the word "omit" the taxpayer contended that the statute was limited to situations in which specific receipts or accruals of income items are left out of the compilation of income items. The Court agreed with the taxpayer's position.

In reviewing the legislative history of the statute the Court concluded that Congress was addressing itself to the specific situation where a taxpayer actually omitted some income receipt or accrual in his gross income, and

[32] 2 L ed at 1122.

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more generally to errors in that computation arising from other causes. The court finally said:

"We think that in enacting § 275(c) Congress manifested no broader purpose than to give the Commissioner an additional two years to investigate tax returns in cases where, because of a taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors. In such instances the return on its face provides no clue to the existence of the omitted item. On the other hand, when, as here, the understatement of a tax arises from an error in reporting an item disclosed on the face of the return the Commissioner is at no such disadvantage."[33]

Thus, in Colony, the court made it plain that the clue must appear on the face of the return. The understatement of the tax in Colony arose from an error in reporting an item disclosed on the face of the return. In such cases, the court said the Commissioner was not at a special disadvantage in detecting the error.

In Phinney the Fifth Circuit in discussing the sufficiency of language used in a return to satisfy the requirements of the statute that the information given on the return should be disclosed in a manner adequate to apprise the Commissioner of the nature of the item, said:

"We conclude that the enactment of subsection (ii) as a part of section 6501(e)(1)(A) makes it apparent that the six year statute is intended to apply where there is *either a complete omission of an item of income of the requisite amount or misstating of the nature of an item of income which places the 'commissioner* * * at a special disadvantage in detecting errors.'" (Emphasis supplied)[34]

Thus, the Phinney court tells us that the six year statute of limitations applies in either of two situations. One situation is where there is a complete omission of an item from a return, as is the case here. The other is where there is a misstatement on the return of the nature of the item which places the Commissioner at a special disadvantage in detecting the error.

Benderoff involved the tax returns of individual taxpayers who held stock in a Subchapter "S" Corporation. The individual returns under the section "other income" showed income from the tax option corporation giving the name of the corporation. The corporation filed a corporate return, for the taxable period, allocating all of the taxable income reported by it to its shareholders. During the taxable year, however, the corporation made a cash distribution to its stockholders of an additional amount which was not reported by it as being taxable to the stockholders. The Commissioner claimed that this cash distribution constituted taxable income to the taxpayers. The taxpayers asserted that the distribution constituted income upon which taxes had already been paid, but which had not been distributed. A balance sheet was attached to the corporate return, which disclosed information from which the Commissioner could have determined that the taxpayers had omitted the cash distributions from their individual returns. The Commissioner made deficiency assessments, but only after three years from the date of filing of the returns. The question presented was whether or not the Commissioner was given an adequate clue in the balance sheet that there had been a distribution of shareholder's taxable income. If such a clue existed the three rather than the six year statute applied.

In this connection the court said:

"We now arrive at the critical issue which is whether the taxpayers' returns, supplemented by the Form 1120-S return, adequately disclose the distribution of undistributed taxable income.

* * * * *

The proper test thus appears to be whether the return provides a clue as to the omitted item."[35]

* * * * *

"We hold that the returns of the taxpayers, supplemented by the Form 1120-S corporate information return, provides an adequate clue as to the omitted income and that the three-year period of limitations governs."[36]

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[33] 2 L ed at 1124, 1125.
[34] 392 F.2d at 685.
[35] 398 F.2d at 136.
[36] Id. at 137.

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In Benderoff the individual returns provided a clue to the Subchapter "S" Corporation, and the corporate return of the latter provided the clue of the omitted item. Here, the Gift Tax Returns do not contain any clue which would direct an examiner to the Estate Tax Return. Benderoff is inapposite.

Taylor, supra, involves an individual joint return of taxpayers who held stock in a Subchapter "S" Corporation. Their 1961 return disclosed income derived solely from wages. One of the taxpayers owned twenty-five per cent of the stock in a closely held corporation, which became a Subchapter "S" Corporation on March 1, 1961. During the fiscal year ending February 28, 1962, the corporation derived income of $100,000.00, and that income was reported on its Subchapter "S" information return for the fiscal year ending February 28, 1962. Distributions totalling $18,000.00 were made in March and September, 1961 to one of the taxpayers. Because of the taxpayers mistaken belief that the distributions were not reportable as gross income in 1961 they made no reference thereto on their return for that year. The Commissioner made a deficiency assessment on such distributions on March 31, 1967, more than three years, but less than six years, after the filing of the return. The question thus presented was whether the period within which the Commissioner might assess a tax deficiency was extended from three to five years because of taxpayers' failure to report or adequately disclose an item of gross income, admittedly taxable in 1961, on their federal income tax return for the year 1961. The court said:

> "Thus we must determine whether taxpayers made a disclosure of the omitted income sufficiently adequate to put the Government on notice of the nature and amount of the omission.
>
> As previously stated, taxpayers' 1961 tax return contained no reference to Carolyn Taylor's income from the Subchapter "S" corporation. Furthermore, there was no reference made to the Subchapter "S" corporation in taxpayers' individual return, nor on any schedule contained therein or any statement attached thereto. Under these circumstances, the Government, by examination of taxpayers' individual return, was given no indication of the possible existence the nature, or the amount of the omitted item nor was it referred t any other source of such information This Court has long recognized tha the extended period of limitations ap plies when there is no disclosure o an item of income on the face of tax return. Foster's Estate v. Commissioner of Internal Revenue, 5t Cir. 1942, 131 F.2d 405.
>
> • • • • •
>
> Since the Government in this cas examined an individual income ta return giving no suggestion or infe ence that relevant information ma have been contained elsewhere, cannot be seriously contended tha the 'adequate disclosure' referred t in section 6501(e)(1)(A)(ii) wa made. Therefore, the six-year perio of limitations was applicable in thi situation."[37]

It is clear after a study and analys of the cases cited by plaintiff that ther must be some clue on the face of th return itself or in a statement attache thereto, which is adequate to apprise th Secretary or his delegate (the age charged with the responsibility of exam ining the return) of the nature an amount of the omitted item, if the thre rather than the six year period of limi tation applies. In the case sub judic there is no clue of any nature on eithe of the returns in question, nor in an statement attached to either one of ther Consequently, the six year period of limi tation applied to the returns and the a sessments were, in the opinion of th Court, timely made.

Conclusion

There is no genuine issue as to a material fact in the case, and the d fendant is entitled to a judgment as matter of law. Rule 56(c), F. R. Civ.

Plaintiff's Motion For A Summa Judgment will be overruled and defen ant's Cross-Motion For A Summa Judgment will be sustained.

An appropriate judgment will be e tered by the Court.

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[37] 417 F.2d at 993, 994.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

VASSER BISHOP, as Executrix of
the Estate of David H. Bishop,
Deceased,

Plaintiff

v. No. WC69-43-S

UNITED STATES OF AMERICA,

Defendant

FINAL JUDGMENT

Counts 1 and 2 in this action were dismissed on the merits by an order entered herein June 19, 1970, when the Court sustained defendant's cross-motion for summary judgment as to each of said counts.

The parties herein through their respective counsel filed with the court on January 4, 1971, a stipulation wherein the parties stipulated and agreed that the contemplation of death issue in the above entitled action be dismissed with prejudice, each party to bear its own costs with respect thereto, said stipulation bearing date of December 22, 1970. Plaintiff filed in this action on March

22, 1971, a request for admission of facts and of genuineness of documents, which request was served on defendant on March 19, 1971.

Responding to said request, defendant filed on April 22, 1971, its objection to the aforesaid request for admission of facts and genuineness of documents, and as a basis therefor stated that all issues involved in the action had theretofore been resolved by decision of the Court or by settlement and agreement of the parties.

Plaintiff thereafter filed on April 28, 1971, with the clerk a motion in this action for an order adjudicating that the facts and genuineness of the documents be taken as established. The Court has heretofore overruled the said motion.

At the hearing on the motion plaintiff tendered to the Court a proposed judgment to be entered which had been approved as to form by counsel for plaintiff and counsel for defendant. The defendant objected to the entry of the order at this time, since it was tendered to counsel for the plaintiff for approval and presentation to the Court for entry along with the stipulation hereinabove referred to. The defendant has requested the Court to strike the signature of defendant's attorney on the proposed judgment whereby the said attorney approved the judgment as to

form, and the Court has stricken from said proposed judgment the name of said attorney.

The Court enters this order in lieu of the proposed judgment tendered to the Court.

After consideration of the status of the action it is

ORDERED:

(1) That all issues herein have been finally determined by the previous order of the Court sustaining defendant's cross-motion for a summary judgment as to Counts 1 and 2, said order having been entered on June 19, 1970, and amended to allow the plaintiff to pursue an interlocutory appeal in this action on July 1, 1970, and by the stipulation filed by the parties.

(2) That this action shall be and the same hereby is finally dismissed on the record herein.

This the 27th day of May, 1971.

Orma R. Smith

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2912
Summary Calendar*

VASSER BISHOP, as Executrix of the Estate of David H. Bishop, Deceased,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

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(March 7, 1972)

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM: AFFIRMED. *See* Local Rule 21.[1] *Bishop v. United States of America*, N.D. Miss. 1971, ____ F. Supp. ____.

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*Rule 18, 5th Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al*, 5th Cir. 1970, 431 F.2d 409, Part I.

[1]*See NLRB v. Amalgamated Clothing Workers of America*, 5th Cir. 1970, 430 F.2d 966.

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2912
Summary Calendar

D. C. Docket No. WC 69-43-S

VASSER BISHOP, as Executrix of the Estate of David H. Bishop, Deceased,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was taken under submission by the Court upon

the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

March 7, 1972

Issued as Mandate: May 4, 1972

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. S71-2912

VASSER BISHOP, as Executrix of the Estate of David H. Bishop, Deceased,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that Appellant's motion to remove the above cause from the summary calendar and to permit oral argument is hereby Denied.

APPENDIX F

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2912

VASSER BISHOP, as Executrix of the Estate of David H. Bishop, Deceased,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Mar. 7, 1972, 5 Cir., 1972, ____ F.2d ____).

(April 26, 1972)

Before THORNBERRY, COLEMAN and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Petition for Writ of Certiorari have been served upon the Defendant by placing the same, air mail postage prepaid, in the United States mail, addressed to:

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

This the 21st day of July, 1972.

Lomax B. Lamb, Jr.